No.

In the Supreme Court of the United States

OCTOBER TERM, 1941

FEDERAL TRADE COMMISSION, PETITIONER

v.

RALADAM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Sixth Circuit entered in this cause on October 7, 1941, which set aside an order of the Commission directing the respondent to cease and desist from certain alleged unfair methods of competition.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 781) is reported in 123 F. (2d) 34.

JURISDICTION

The decree of the Circuit Court of Appeals was entered October 7, 1941 (R. 780). The jurisdic-

tion of this Court is invoked under Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C., sec. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether an order of the Federal Trade Commission prohibiting unfair methods of competition requires for its support direct proof of actual damage to particular competitors.

(2) Whether a court in reviewing an order of the Commission may disregard the statutory requirement that the findings of the Commission, when supported by testimony, shall be conclusive, by making its own independent appraisal of the testimony and of the inferences reasonably to be drawn therefrom.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C., sec. 45, provides in part as follows:[1]

> Unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships,

[1] The Commission issued its order in this case prior to passage of the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., Supp. V, sec. 45, which amended Section 5 by authorizing the Commission to prevent "unfair or deceptive acts or practices in commerce."

or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

* * * * * *

* * * the findings of the commission as to the facts, if supported by testimony, shall * * * be conclusive.

STATEMENT

For many years respondent has been engaged in marketing a preparation for reducing weight called "Marmola". An order of the Federal Trade Commission issued in 1929 directing respondent to cease from making misleading representations in the sale of Marmola was held invalid in *Federal Trade Commision* v. *Raladam Co.*, 283 U. S. 643, upon the ground that there was no substantial evidence to show that any other products were sold in interstate commerce in competition with respondent's preparation and that, in the absence of such evidence, the Commission lacked jurisdiction to issue an order against unfair methods of "competition". The Court, however, stated (p. 646) that the evidence supported the finding that respondent's preparation "cannot be used generally with safety to physical health except under medical direction and advice."

The present proceeding was instituted in July 1935 by the filing of an amended complaint

against respondent (R. 44). After evidence had been taken, the Commission made detailed findings of fact (R. 16–39) and entered an order prohibiting certain specified misrepresentations (R. 40–43). Among the facts found by the Commission are:

Respondent sells its preparation in competition with many other articles and products designed to reduce weight. These competitive products, 26 of which are named, are chiefly patent medicines,[2] pharmaceutical products containing desiccated thyroid, and books of instruction on weight reduction. (R. 17–21.)

Marmola contains certain innocuous ingredients, others having a laxative effect, and desiccated thyroid. The latter is the only one actively affecting weight. The taking of thyroid increases the oxidation of all tissues of the body and when the tissues (including fatty tissue) are burned up more rapidly than they are restored by food, loss of weight results. But the taking of thyroid does not restore an inactive or underactive thyroid gland; it simply supplements the secretions of this gland. (R. 22.)

Most cases of overweight are caused by incorrect eating habits and less than 5% are due to

[2] By "patent medicine" we mean a preparation advertised as a remedy and sold to the general public for use without a doctor's prescription.

thyroid deficiency. Where the latter is found to be the cause many physicians use desiccated thyroid as a treatment but they do so only if the patient is found to be free from any pathological condition making this treatment harmful or dangerous. Among the conditions which inhibit administration of thyroid are various heart defects, kidney diseases, pregnancy, and abnormal or diseased conditions of organs of the body. Only a trained and experienced person can determine whether obesity is due to thyroid deficiency, whether the prospective user's physical condition is such as to make it safe to administer thyroid, the amount of the dose, the effect it produces, and how long it should be continued. (R. 23–24.)

Respondent widely advertises its product (R. 36) and in this advertising makes various false and misleading representations, of which the following are typical: Thyroid deficiency is the usual cause of overweight (R. 24–25); all modern physicians use thyroid in the treatment of obesity; this medication has the support of world-wide medical opinion; it would probably be prescribed if the purchaser consulted a physician (R. 25–26); taking Marmola is the best way to reduce (R. 27–28); taking it restores the thyroid gland to normal and thus removes the cause of obesity (R. 28–29); all relevant information concerning Marmola and its effect which a prospective purchaser needs to have before deciding upon the use of Marmola is

fully and truthfully disclosed in respondent's advertising material (R. 30–36).

The foregoing false and misleading representations induced members of the public to purchase Marmola in preference to the products of competitors and diverted trade from such competitors (R. 36–37).

In making these findings, the Commission had before it the following evidence bearing upon competition:

The trade in Marmola is substantial, averaging between $350,000 and $400,000 a year (R. 107). Respondent does not sell through the mails [3] but sells either to wholesale druggists or to retail drug stores. In either case sales to the consuming public are through the retail drug store (R. 90). Many other patent medicines advertised as effective in reducing weight are sold through the same trade channels as Marmola. One wholesale drug firm handling Marmola handled 11 other patented remedies [4] sold for reducing purposes (R. 257–267, 272). Another wholesale firm dealing in Marmola handled five other patent medicines [5] adver-

[3] Respondent's predecessor had discontinued mail sales of Marmola after the Post Office Department had objected to this use of the mails (R. 92–94).

[4] Nitra Phen Fifties, Arbolene Tablets, Van Nay Tablets, Reducoids, Slendrets, Germania Herb Tea No. 14, Stardom's Hollywood Dietade No. 1, Jad Salts, Eskay's Dextrettes, Dietene, Bon Kora.

[5] Jad Salts, Van Nay Tablets, Dr. McCaskey's RX Tablets, Reducoids, Slendrets.

tised as remedies for excess weight (R. 239–243, 245–247, 254–255). There was a like situation in the retail field. One chain of retail drug stores (Liggett's) sold Marmola and eight other packaged antiobesity remedies* side by side over the counter (R. 474–482). Another such chain sold Marmola and one other like patented remedy (R. 333–335).

These same wholesale and retail druggists sold various pharmaceutical products containing desiccated thyroid which are advertised only to the medical profession and are ordinarily bought by consumers on a doctor's prescription (R. 252–254, 270–272, 339, 481).

Various books advertised as setting forth systems or methods for reducing weight have been widely sold in interstate commerce (R. 274–275, 416–418, 420–423, 488–490).

From this evidence that other obesity cures were sold to the public through the same outlets, the Commission inferred as a fact that the producers of such other products were in competition with respondent and that they would be injured by respondent's misrepresentations (R. 36–37).

The court below set aside the Commission's order upon the ground that, under the tests laid down in *Federal Trade Commission* v. *Raladam*

* Van Nay Tablets, Bon Kôra, Cole's No. 19, Vegetoids, Eliphat, Retardo, Phytoroides, Dietene.

Co., 283 U. S. 643, there was no substantial evidence to support the Commission's finding that respondent's misrepresentations were injurious to competitors (R. 784–785). What the Court apparently regarded as a fatal defect under this decision was the absence of any direct testimony that particular products were competitive and the absence of direct proof of actual damage to particular competitors.[7] The court, while purporting to set forth the evidence relevant to the question of competition, ignored most of the evidence to which we have previously referred.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that there was no substantial evidence to support the Commission's finding that respondent's misrepresentations were injurious to competitors.

(2) In disregarding the statutory provision that the findings of the Commission, if supported by testimony, shall be conclusive.

(3) In setting aside the order of the Commission.

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[7] Immediately preceding the statement that there was "no substantial evidence supporting the formula of the Supreme Court" in the *Raladam* case, the court said (p. 784): "There was slight evidence that one or two companies selling the patented remedies had had a recent decline in sales. Only one or two witnesses were expressly questioned as to whether they considered Marmola a competing preparation. One emphatically disclaimed any such competition."

REASONS FOR GRANTING THE WRIT

1. We submit that the decision below is in conflict with *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643. That case held that Section 5 of the Trade Commission Act does not authorize the Commission to prevent unfair trade practices in commerce "apart from their actual or potential effect upon the trade of competitors" and that if, as in that case, the evidence leaves such effect "without proof" and within the realm of mere "conjecture," the Commission lacks jurisdiction to act.* But the Court was careful to state that the evidence need not identify the competitors injured and need not establish specific injury—that it is sufficient if the showing as to competition reasonably warrants the inference that the unfair trade practices will adversely affect the trade of competitors. The Court said (p. 651)—

> * * *, it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or *potential* substantial competition, which is shown by proof, or *appears by necessary inference*, to have been injured, or *to be clearly threat-*

* There the sole evidence concerning competition consisted of a list of various alleged antifat remedies which an officer of the American Medical Association had prepared "within the last two days" and testimony by this witness that he had recently been able to purchase six such remedies in Chicago drug stores. See the *Raladam* opinion, p. 653, and Record in that case, pp. 111–112.

> *ened with injury,* to a substantial extent, by the use of the unfair methods complained of. [Italics supplied.]

In the present case the court below apparently misconstrued the statement in the *Raladam* case (p. 653):

> None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business.

All that this means is that the absence of such evidence is a relevant consideration, but this Court neither held nor implied that evidence of this character is prerequisite to a valid finding of injury to competitors.

The decision below is also in conflict with *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, where the evidence showed that respondent's labels deceived members of the general public as to the material of which its underwear was composed and that there were other manufacturers selling underwear not thus mislabeled. This Court viewed injury to competitors as not only a permissible but a necessary inference from these facts.[9] It said (p. 494) that the Commis-

[9] In that case there was not even a finding that respondent's practices diverted trade from, or otherwise injured, competitors. The Commission limited its findings to the basic facts, from which it drew the conclusion that the practices in question were unfair methods of competition. See Record in the *Winsted* case, pp. 45–51.

sion was justified in concluding that respondent's practices constituted unfair methods of competition since the business of its trade rivals was "necessarily affected by" its mislabeling.

2. The decision below is in conflict with decisions of four other circuit courts of appeals on the same matter. In two cases (each involving misrepresentation as to the therapeutic effect of a product) the Circuit Court of Appeals for the Ninth Circuit has held that where the evidence shows the sale in commerce of other products serving the same purpose as the misrepresented product, injury to competitors may be properly inferred and direct proof of injury is not requisite to the validity of the Commission's order. *Electro Thermal Co.* v. *Federal Trade Commission,* 91 F. (2d) 477, 480, certiorari denied, 302 U. S. 748; *Alberty* v. *Federal Trade Commission,* 118 F. (2d) 669, 670–671, certiorari denied, October 13, 1941, No. 104, this Term. The court in the former case said:

> In this case there are definitely identified parties manufacturing and selling in interstate commerce a device adapted to the same purposes as is the petitioner's. * * *
>
> What the record lacks is any direct evidence to the effect that petitioner's misleading advertising claims diverted any business from its competitors. This, however, is not required by the decision in the Raladam Case, and would in many cases

> be impossible to prove. It would seem to be sufficient to show actual or potential competition and unfair trade practices which reasonably tend to give the perpetrator an advantage in such competition. * * *

The same test has been applied by three other circuit courts of appeals. *E. Griffiths Hughes, Inc.*, v. *Federal Trade Commission*, 77 F. (2d) 886, 888 (C. C. A. 2), certiorari denied, 296 U. S. 617; *Federal Trade Commission* v. *Artloom Corp.*, 69 F. (2d) 36, 38 (C. C. A. 3); *International Art Co.* v. *Federal Trade Commission*, 109 F. (2d) 393, 397 (C. C. A. 7); *Allen B. Wrisley Co.* v. *Federal Trade Commission*, 113 F. (2d) 437, 442 (C. C. A. 7).

3. The issue as to which this conflict has arisen is of great importance in the administration of the Federal Trade Commission Act. Practically every proceeding under the Act in which a respondent is charged with engaging in unfair methods of competition presents the question of the character of the proof necessary in order to support a finding of injury to competitors. In most cases definite proof that misrepresentations have caused particular consumers to purchase one product rather than another is difficult to obtain, although proof of the existence of competition leads to the obvious inference that misrepresentations will achieve their purpose of diverting trade from competitors.

The importance of an authoritative determination by this Court which will remove the doubt and uncertainty created by the decision below is not materially lessened by the recent amendment of Section 5 by the Act of March 21, 1938, 52 Stat. 111, authorizing the Commission to prohibit "unfair or deceptive acts or practices in commerce." While the purpose of this amendment was to eliminate the necessity of showing adverse effect upon competitors in every proceeding under Section 5, the phrase "unfair methods of competition" remains in the law and many pending proceedings are, and many future ones will be, based solely upon this phrase.[10]

The Commission has informed the Department of Justice that, apart from the order here involved, there are now outstanding 29 orders issued by it under Section 5 of the Trade Commission Act, as well as 50 stipulations to which it is a party, prohibiting misrepresentation in the sale of products advertised as efficacious remedies, devices, or means for reducing weight. *E. g., E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F.

[10] The Commission has informed the Department of Justice that there are seven cases pending in court and ten proceedings pending before the Commission in which the complaint was issued prior to March 21, 1938, and that there are nine cases pending in court and forty-nine proceedings pending before the Commission in which the complaint, although issued after March 21, 1938, alleged, solely, use of unfair methods of competition.

(2d) 886, 888 (C. C. A. 2), certiorari denied, 296 U. S. 617. It would be a serious miscarriage of justice if, in the face of these outstanding prohibitions against others engaged in the same type of trade, respondent—probably the leading concern in this field of activity—should be permitted to continue its misrepresentations because of an erroneous court decision. The fact that it has been found that respondent's representations are likely to result in injury to the health of purchasers of its product (R. 32–33) is an additional reason for the granting of the writ of certiorari.

4. We submit that the decision below constitutes, in substance if not in form, a serious breach of the statutory provision that the findings of the Commission, "if supported by testimony," shall be conclusive. Furthermore, it is for the Commission, not the reviewing court, to determine the "inferences reasonably to be drawn" from the admitted or established facts. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63. Adherence to these requirements in form but departure therefrom in substance has been sharply condemned by this Court. In *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, it said:

> In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among un-

certain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Trade Assn.*, 273 U. S. 52, 61, 63), forbid that exercise of power.

In the instant case the Commission inferred, from evidence that other obesity cures were sold in the same markets, that respondent's misrepresentations would be harmful to competitors. This conclusion would appear to be inescapable, and yet the court below held not only that the inference was not a permissible one but that it lacked substantial support.

While certiorari will ordinarily not be granted to review alleged error in the determination of questions of fact, this Court has indicated that it is a matter of "high importance" that the courts give due regard to a statutory command that the findings of an administrative body be taken as conclusive when they are supported by evidence. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208–209. In that case this Court said, in explaining its grant of certiorari to review such alleged error:

> Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. * * *

We submit that even if there were no other error worthy of review in the instant case, the error of the court below in substituting its judgment upon the facts for that of the Commission presents, under the circumstances, a question meriting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

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